

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
MATRIMONIAL PROPERTY CASE NO. E021 OF 2025

CATHERINE MUTHONI NYAGA.....
PLAINTIFF

VERSUS

JAMES NDURUHIU MURAYA.....
.....DEFENDANT

R U L I N G

Brief facts

1. Coming up for determination is the defendant's Notice of Preliminary Objection dated 8th December 2025 based on grounds that the plaintiff lacks locus standi to file this suit as there is no relationship, either by marriage, contractual or otherwise as between the parties in regard to the suit property. The defendant further states that the suit property is private property and has never been matrimonial property and thus the court lacks jurisdiction to issue the orders sought in the originating summons. The defendant states that the orders sought in the originating summons are an infringement to his right to ownership and use of his property as guaranteed under Article 40 of the Constitution.

2. Parties put in written submissions.

The Defendant's Submissions.

3. The defendant submits that there has been no marriage between him and the plaintiff and therefore in the absence of a marriage, the plaintiff cannot maintain an action against him under the Matrimonial Properties Act. The defendant further submits that the plaintiff in her affidavit states that she is married to him under Kikuyu Customary Law and that the said marriage was solemnized in 2012. She further attached a letter from the chief dated 25th July 2025 as a confirmation that she was married to him. The defendant argues that the plaintiff has failed to demonstrate that all or some of the required rituals were conducted to solemnize the marriage as required under Kikuyu customs. Further, she failed to show under whom the alleged marriage was solemnized or to produce any instrument to confirm the alleged solemnization.

4. The defendant refers to **Section 107 of the Evidence Act** and submits that the plaintiff produced a letter from the chief as a confirmation that she was married to him however the said letter does not state where the said marriage was conducted and by whom. Further, the said letter has no evidential value as marriages are not conducted by the chief. The defendant further refers to Section 43 of the Marriage Act and submits that a kikuyu customary marriage consists of certain rites which must

be performed particularly a ngurario which if not performed, no valid marriage exists. Additionally, dowry/ruracio must be paid before the marriage can be considered valid. In the instant case, there is no evidence or confirmation that the essential rites or rituals were performed or conducted in line with Kikuyu customs.

5. The defendant refers to **Section 44 of the Marriage Act** and submits that no notice has been issued more than 20 years after the alleged marriage was allegedly contracted. Further, Section 12 of the Act makes such marriage voidable where parties fail to give notice within the prescribed period.

The Plaintiff's Submissions.

6. The plaintiff relies on the cases of **John Musakali vs Speaker County of Bungoma & 4 Others (2015) eKLR** and **Oraro vs Mbaja [2005] 1 KLR 141** and submits that the issues touch on disputed facts which cannot be raised by way of a preliminary objection. The plaintiff submits that she is married to the defendant under Kikuyu Customary Law and that the said marriage was solemnized in 2012. Further, the existence of the marriage is a factual issue to be determined at trial through evidence. To support her contentions, the plaintiff relies on the case of **Mary Wanjiku Githatu vs Esther Wanjiru Kiarie [2010] eKLR**. The plaintiff further relies on the cases of **Gituanja vs Gituanja [1983] KLR 575** and **Eliud Maina Mwangi vs Margaret Wanjiru**

Gachangi CA NRB Civil Appeal No. 281(A) of 2003 [2013] eKLR and submits that proof of customary law is a question of fact proved by evidence, including testimony of experts.

7. The plaintiff submits that evidence of the marriage includes an affidavit confirming marital status executed by the parties on 2nd March 2020 confirming the existence of the marriage. Further, the defendant has described her as his wife in his loan application documents with Nation Sacco Society Ltd.

8. Relying on the case of **Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229**, the plaintiff submits that the defendant has failed to show the court that he may not enjoy his right to appear and be heard in the instant court. The plaintiff further submits that the issues of whether the suit property is private property or matrimonial property and whether the defendant's rights to ownership and use of the suit property are contested facts and cannot be determined by the court without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. The court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. To support her contentions, the plaintiff refers to the case of **Presbyterian Foundation & Another vs East Africa Partnership Ltd & Another [2012] eKLR**.

9. The plaintiff relies on the cases of **Quick Enterprises Ltd vs Kenya Railways Corporation Kisumu High Court Civil Case No 22 of 1999** and **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] eKLR** and argues that determining the issues raised in the preliminary objection would mean that the court would not have had an opportunity to ventilate on the issues that would have been raised by her.

The Law

Whether the preliminary objection is sustainable.

10. The case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

11. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is

sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

12. Similarly the Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

13. Further in the case of **Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR** the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

14. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one

conclusion: that the facts are incompatible with that point of law.

15. The defendant argues that the plaintiff lacks *locus standi* to institute the suit as they were never married and the suit property is private property and has never been matrimonial property.

16. The Supreme Court in **Petition No. 8 of 2020 Law Society of Kenya vs Communications Authority & 10 Others** had this to say on whether a question of *locus standi* is a pure point of law to be determined by the court in *limine*:-

.....the issue for determination is whether this Court has jurisdiction to hear and determine this appeal and whether the appellant is a proper party before this Court and has *locus standi* in this appeal. This court in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR held that the issue of *locus standi* raises a point of law which touches on the jurisdiction of the court, and it should be resolved at the earliest opportunity.

17. In **Turn Key International Trade Limited vs Sunmatt Limited (Sundip Shah) (Civil Suit E406 of 2022) [2024] KEHC 2701 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)** the High Court had this to

say on whether a preliminary objection on *locus standi* is a pure point of law:-

A claim that a party lacks *locus standi* is a purely legal matter that must be brought up and resolved as soon as possible. In the circumstances, I find the preliminary objection as filed is proper as it raises pure points of law.

18. Accordingly, the issue of *locus standi* is a question that of a pure point of law that can be resolved on a preliminary objection.

19. The other issue for determination is whether the plaintiff has the *locus standi* to initiate the said proceedings based on the allegations that she and the defendant were never married. According to the plaintiff, she and the defendant were married under Kikuyu Customary Law and their marriage was solemnized in the year 2012. The defendant on the other hand argues that they were never married and that the plaintiff has not proved that they were married under Kikuyu Customary Law. The issue of proving the existence of a marriage between the parties is a question of fact that can only be discerned through evidence. Parties need to adduce evidence through oral testimony and documentary evidence which can only be ventilated during the trial. Upon determining whether a valid customary marriage existed between the parties, the court will determine if the property is matrimonial property based on evidence

adduced by the parties. It is trite that the issues of a valid customary marriage and whether the suit property is matrimonial property are issues of fact and cannot be determined at the current stage vide a preliminary objection.

20. Accordingly, the preliminary objection is not sustainable as it raises questions of fact. In that regard the preliminary objection dated 8th December 2025 lacks merit and is hereby dismissed.

21. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 30TH DAY OF APRIL 2026.***

**F. MUCHEMI
JUDGE**